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# State of Utah v. Dennis Loveless : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

DENNIS LOVELESS,

Defendant-Appellant.

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BRIEF OF

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APPEAL FROM THE  
JUDICIAL DISTRICT  
DAVIS COUNTY,  
HONORABLE J. L.

JACKSON HOWARD

HOWARD, LEWIS & PETERSEN  
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Provo, Utah 84601

Attorneys for Appellant

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

DENNIS LOVELESS,

Defendant-Appellant.

Case No.  
15511

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with aggravated sexual assault, a felony of the first degree.

DISPOSITION IN THE LOWER COURT

The jury returned a guilty verdict, and the Honorable J. Duffy Palmer, District Judge, sentenced the appellant to a term of not less than five years nor more than life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of the Court affirming the judgment and sentenced rendered below.

## STATEMENT OF FACTS

Appellant has filed only an abbreviated record on appeal, and respondent is therefore without a complete knowledge of the facts. Appellant was charged with committing an aggravated sexual assault upon Brenda Winnett in Farmington, Utah, on February 6, 1977 (R.1). The appellant was intoxicated at the time the offense was committed (T.5); the victim was eleven years old (T.8). The record reveals no further facts about the offense, but the court below stated that, "I have not had a case since I have been on the Bench that troubled me more, that would make me weep more." (T.9).

The jury was provided with verdict forms for several lesser included offenses: attempted aggravated sexual assault, forcible sexual abuse, and assault (R.3-6). The record does not indicate that there was any request for a jury instruction on the lesser and included offense of rape. On the contrary, appellant's first attempt to raise the issue now presented on appeal was after the appellant had been convicted of a first degree felony, after counsel for appellant stated that he knew no reason why sentence should not be pronounced (T.2), and after the court had refused to place the appellant on probation

(T.9). In this appeal, appellant does not attack his conviction, but only the judgment and sentence (Brief of Appellant, page 2).

#### ARGUMENT

#### POINT I

APPELLANT'S FAILURE TO OBJECT PRIOR TO THE PRONOUNCEMENT OF JUDGMENT WAIVES HIS CLAIM OF ERROR THAT HE RECEIVED AN IMPROPER SENTENCE.

At the time of sentencing, the court below asked appellant's counsel if there was any legal reason why sentence should not be passed at this time (T.2). Appellant's counsel replied that there was none (Id.), and argued to the court that the appellant should be placed on probation (T.2-7). The court then pronounced sentence of imprisonment in the State Prison for from five years to life (T.9), the penalty for a first degree felony. The appellant's counsel then, for the first time, argued that the sentence should be reduced to the penalty for a second degree felony (T.9-11).

Respondent submits that the appellant may not suppress a legal reason against sentence in order to gain sympathy from the court or other tactical advantage, and

later reveal the objection when the tactic has failed. Appellant could have timely raised his objection to being sentenced as a first degree felon by requesting a directed verdict, by a motion in arrest of judgment, or by a timely objection prior to the pronouncement of judgment. Respondent contends that error relating to the sentencing process, like all other claimed errors, must be timely raised to be reviewed on appeal. State v. Thacker, 98 Idaho 369, 564 P.2d 1278 (1977). Appellant's failure to make a timely objection waives the claimed error raised in this appeal.

#### POINT II

THE TWO STATUTES DO NOT PROSCRIBE THE SAME CONDUCT UNDER ALL FACTUAL CIRCUMSTANCES, AND APPELLANT HAS FAILED TO SHOW THAT HIS CONDUCT WAS PROSCRIBED IN THE SAME WAY BY BOTH STATUTES.

Respondent agrees with the appellant that, because the offense was committed prior to the effective date of the 1977 amendments to the criminal code, the law governing this appeal is found in Utah Criminal Code, 1973 Utah Laws, ch. 196, §§ 76-5-402, 405, 406 (current version at Utah Code Ann. §§ 76-5-402, 405, 406 (Supp. 1977)). The relevant portions of the statute are:

"(1) A male person commits rape when he has sexual intercourse with a female, not his wife, without her consent.

(2) Rape is a felony of the second degree." Utah Code Ann. § 76-5-402 (Supp. 1975).

"(1) A person commits aggravated sexual assault if:

(a) In the course of a rape. . .

(i) The actor causes serious bodily injury to the victim; or

(ii) The actor compels submission to the rape. . . by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person.

(b) The victim of a rape is under 14 years of age.

(2) Aggravated sexual assault is a felony of the first degree." Utah Code Ann. § 76-5-405 (Supp. 1975).

"An act of sexual intercourse . . . is without consent of the victim under any of the following circumstances:

\* \* \*

(7) The victim is under 14 years of age." Utah Code Ann. § 76-5-406 (Supp. 1975).

Under these statutes, the crime of rape has four elements:

(1) a male who has (2) sexual intercourse with (3) a female, not his wife, (4) without her consent. The crime of

aggravated sexual assault has five elements: the four listed above, and (5) an aggravating circumstance, either injury or threat or the youth of the victim. The two statutes would



proscribe the same conduct if, and only if, the victim's age is used to establish both lack of consent and the aggravating circumstance. The statutes would proscribe different conduct if the State could prove either lack of consent without reference to the victim's age or an aggravating circumstance other than the victim's age.

Respondent submits that appellant has failed to carry his burden on appeal of demonstrating that the court below was in error because the record contains no facts that would show that appellant's conduct fell within the overlapping area of the two statutes. The appellant bears the burden of showing error. State v. Hines, 6 Utah 2d 126, 307 P.2d 887 (1957); State v. Hamilton, 18 Utah 2d 234, 419 P.2d 770 (1966). In Farrow v. Smith, 541 P.2d 1107 (Utah 1975), a defendant, charged with second degree murder, but convicted of manslaughter, attacked his sentence on the ground that manslaughter was not always an included offense. The defendant introduced no evidence and relied solely on argument of counsel. This Court held that the defendant had not carried his burden of demonstrating that he was wrongfully incarcerated. Farrow, at 1109. Respondent contends that the appellant in this case has similarly failed to show that his sentence is unlawful.

# CONCLUSION

Based on the foregoing points and authorities,  
respondent submits that the sentence should be affirmed.

Respectfully submitted,

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